

LAW OFFICES

GULLETT, SANFORD, ROBINSON & MARTIN, PLLC

230 FOURTH AVENUE, NORTH, 3RD FLOOR
Post Office Box 198888
NASHVILLE, TENNESSEE 37219-8888

TELEPHONE (615) 244-4994
FACSIMILE (615) 256-6339

GARETH S. ADEN
G. RHEA BUCY
GEORGE V. CRAWFORD, JR.
A. SCOTT DERRICK
THOMAS H. FORRESTER
M. TAYLOR HARRIS, JR.
LINDA W. KNIGHT
JOEL M. LEEMAN
ALLEN D. LENTZ
JOSEPH MARTIN, JR.
JUSTIN T. MILAM
JEFFREY MOBLEY
JULIE C. MURPHY

REC'D TN
REGULATORY AUTH.
KATHRYN H. PENNINGTON
DAVID ROBERTSON
WAYNE L. ROBBINS, JR.
JACK W. ROBINSON, JR.
JACK W. ROBINSON, SR.
VALERIOUS SANFORD
MARTY S. TURNER
WESLEY D. TURNER
JOHN D. LENTZ
DE COUNSEL
B. B. GULLETT
1905-1992

February 17, 1998

VIA HAND DELIVERY

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37201

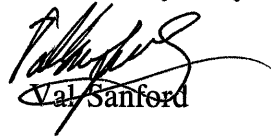
Re: *Hyperion of Tennessee, L.P. Application*
Docket No: 98-00001

Dear Mr. Waddell:

Enclosed, please find the original and thirteen copies of the Brief of AVR, L.P. d/b/a Hyperion of Tennessee, L.P.

Copies are being served on parties of record.

Yours very truly,


Val Sanford

VS/ghc

cc: Bruce Mottern
T. G. Pappas
L. Vincent Williams
Robert C. Wiegand

**BEFORE THE
TENNESSEE REGULATORY AUTHORITY**

REC'D TN
REGULATORY AUTH.

'98 FEB 17 AM 11 26

OFFICE OF THE
EXECUTIVE SECRETARY

In re: AVR, L.P. d/b/a Hyperion of Tennessee, L.P., Application For a Certificate of Public Convenience and Necessity to Extend its Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company

Docket No. 98-00001

**BRIEF OF
AVR, L.P. D/B/A HYPERION OF TENNESSEE, L.P.**

INTRODUCTION

AVR, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion"), by its counsel, and pursuant to the Tennessee Regulatory Authority's ("TRA") February 3, 1998, Order in Docket No. 98-00001, hereby files this Brief requesting relief from TENN. CODE ANN. § 65-4-201(d) and subsequent TRA orders implementing § 65-4-201(d), which have been invoked to prohibit competition in areas served by an incumbent LEC with fewer than 100,000 access lines.

Hyperion and its affiliates operate twenty two (22) competitive local exchange networks in twelve (12) states throughout the United States. These networks currently serve thirty five (35) cities with approximately 4,000 route miles of fiber optic cable, and allow Hyperion and its operating affiliates to offer a broad range of telecommunications services. Through the construction of its own facilities, Hyperion has been able to provide service in rural and outlying areas, such as Coudersport and Scranton, Pennsylvania, and many small towns in Vermont. Hyperion is in the process of constructing an advanced fiber-based network in the Nashville, Tennessee area, and hopes to extend its services to include the areas currently served by Tennessee Telephone.

Hyperion's entry into the local exchange market currently served by Tennessee Telephone will enhance competition in the provision of telecommunications services, and will bring significant benefits to telecommunications users in such areas for whom competitive services are heretofor unknown. Hyperion intends to provide the most economic and efficient services, thereby offering customers a better combination of price, quality, and customer service than its competitors. Accordingly, Hyperion anticipates that its proposed services will provide subscribers with better quality services and will increase consumer choice of innovative, diversified, and reliable service offerings.

As an initial matter, Hyperion emphasizes that at this time, Hyperion requests only that it be certificated to *provide telecommunications services* in Tennessee Telephone's service territory. Hyperion is not requesting the termination of any small or rural LEC exemption that Tennessee Telephone may claim. In particular, Hyperion does not seek unbundled access to Tennessee Telephone's network elements, collocation, resale at a wholesale discount, or any other additional obligation imposed on incumbent LECs in section 251(c) of the Telecommunications Act of 1996 ("1996 Act").¹ Rather, Hyperion simply intends to offer its own services over its own facilities, and expects only that both parties will abide by the obligations imposed on all local exchange carriers in §§ 251(a) (general duties of telecommunications carriers) and 251(b) (general duties of all local exchange carriers) of the 1996 Act.

Part I of this brief sets forth the background and procedural history of Hyperion's petition to expand its authority to include the service territory of Tennessee Telephone. Part II analyzes

¹ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151 *et. seq.*) ("1996 Act").

the challenged provisions of the Tennessee Code at issue in this proceeding. Part III of this brief clarifies that the rural local exchange carrier ("LEC") exemption contained in the 1996 Act provides only certain relief from the heightened interconnection requirements imposed on incumbent LECs, not blanket protection against competition. Part IV discusses the federal government's power to preempt state law. Part V discusses FCC decisions preempting statutory provisions that are virtually identical to the Tennessee statute at issue in this proceeding. Finally, Part VI of this brief establishes that the incumbent LEC protection provision contained in the Tennessee Code is preempted by federal law.

I. Despite Hyperion's Qualifications to Offer Service in Tennessee and the Need For Competition in Rural Areas, Hyperion's Certification Was Restricted to Offer Service Only in Areas Served By Incumbent LECs With Greater Than 100,000 Access Lines

On August 24, 1995, the Tennessee Public Service Commission ("TPSC") granted Hyperion a Certificate of Public Convenience and Necessity to provide all forms of telecommunications services in Tennessee ("Certification Order").² In granting this certificate, the TPSC specifically found that Hyperion possesses the requisite technical, managerial, and financial qualifications to render local exchange telecommunications services throughout the state of Tennessee. In the Certification Order, however, the TPSC reserved the question as to whether Hyperion would be authorized to serve that part of Davidson County served by

² *In re: The Application of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Provide Intrastate Point-to-Point and Telecommunications Access Service Within the State of Tennessee*, Order, Docket No. 94-00661, (T.P.S.C. Aug. 24, 1995).

Tennessee Telephone Company³ and United Telephone Company. On March 8, 1996, constrained by the statutory limitations imposed by § 65-4-201(d), the TPSC issued an order restricting Hyperion's certificate to compete only in those areas of Tennessee which are currently served by entities that have 100,000 or greater access lines in Tennessee.

Since that time, the FCC has considered the validity of two statutory provisions that are virtually identical to § 65-4-201(d), and has preempted both. The FCC found that such provisions conflict with federal law, and are thus unenforceable. In view of these developments, Hyperion has been placed in a position to offer telecommunications services to the types of customers who are so often overlooked by competitive carriers -- rural customers. As a result, on January 2, 1998, Hyperion filed a Petition with the TRA requesting an extension of its authority to include the areas currently served by Tennessee Telephone Company ("January 2, 1998 Petition"),⁴ since the previous restrictions imposed on Hyperion's certification are preempted under federal law.

II. Tennessee Law Prohibits Competition in Rural Areas

On June 6, 1995, prior to the enactment of the 1996 Act, the Tennessee Legislature

³ Tennessee Telephone Company is a wholly-owned subsidiary of TDS Telecommunications Corporation ("TDS Telecom"), which in turn is a wholly owned subsidiary of Telephone & Data Systems, Inc., a publicly traded corporation having annual revenues in excess of \$1 billion. TDS Telecom operates 105 telephone companies which serve approximately 493,000 access lines in 28 states. TDS Telecom has approximately 67,331 residential access lines and 19,478 business access lines in the state of Tennessee.

⁴ *In re: AVR, L.P. d/b/a Hyperion of Tennessee, L.P., Application For a Certificate of Public Convenience and Necessity to Extend its Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company*, Application, Docket No. 98-00001 (Filed Jan. 2, 1998).

enacted Chapter 408 of the Public Acts of 1995. Specifically, the Tennessee Legislature amended Section 65-4-201, which provides that

(b) Except as exempted by provisions of state or federal law, no individual or entity shall offer or provide any individual or group of telecommunications services, or extend its territorial areas of operations without first obtaining from the Tennessee Regulatory Authority a certificate of convenience and necessity for such service or territory...

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.

(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on the effective date of this act.⁵

At issue in this proceeding is only the validity of § 65-4-201(d). As stated previously, in issuing Hyperion a Certificate of Public Convenience and Necessity, the TPSC has already determined that Hyperion possesses the technical, managerial and financial qualifications to render telecommunications services in Tennessee, and that Hyperion has satisfied all preconditions for providing such services. Only § 65-4-201(d), which prevents a competitive local exchange carrier ("CLEC") from competing in areas served by incumbent LECs having fewer than 100,000 access

⁵ TENN. CODE ANN. § 65-4-201.

lines, prohibits Hyperion from providing service in Tennessee Telephone Company's territory. As stated previously, the limitations imposed by § 65-4-201(d) have been removed, and Hyperion requests authority to provide service in Tennessee Telephone's service territory.

III. The Rural LEC Exemption Does Not Exempt Rural LECs From Competition, It Merely Provides Rural LECs With Certain Relief From Section 251(c) of the 1996 Act

Section 251(a) of the 1996 Act states that *each telecommunications carrier* has the duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers," and the duty "not to install network features, functions, or capabilities that do not comply with the guidelines and standards established" by the 1996 Act.⁶ Section 251(b) provides for the following:

(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS.--Each local exchange carrier has the following duties:

(1) RESALE.--The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) NUMBER PORTABILITY.--The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) DIALING PARITY.--The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) ACCESS TO RIGHTS-OF-WAY.--The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) RECIPROCAL COMPENSATION.--The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

The plain language of Section 251(a) imposes a general duty on "each telecommunications

⁶ 47 U.S.C. § 251(a) (1996) (emphasis added).

carrier,” and Section 251(b) also imposes an obligation on “each local exchange carrier.” Thus, both Hyperion and Tennessee Telephone have the obligation to provide each other with interconnection, resale, number portability, dialing parity, and access to rights-of-way.

Section 251(f) of the 1996 Act was designed only to provide small or rural incumbent LECs with certain relief from the requirements of Section 251(c), which imposes additional obligations on incumbent LECs to resell their services at a wholesale discount, offer collocation, provide access to their unbundled network elements, etc.⁷ Specifically, 251(f) provides:

(f) EXEMPTIONS FOR CERTAIN RURAL TELEPHONE COMPANIES.--

(A) EXEMPTION.--Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State Commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with Section 254....

In its January 2, 1998 Petition, Hyperion requested certification to provide service in Tennessee Telephone’s service territory, not interconnection under Section 251(c). Furthermore, at this time, Hyperion is not requesting that the TRA terminate any small or rural LEC exemption that

⁷ The additional obligations imposed on incumbent LECs by section 251(c) include: 1) the duty to negotiate in good faith an interconnection agreement under section 252 of the 1966 Act; 2) the duty to provide interconnection for the transmission and routing of traffic that is at least equal in quality to that provided by the incumbent LEC to itself or its affiliates, on rates, terms, and conditions that are just reasonable and nondiscriminatory; 3) the duty to provide access to unbundled elements at any technically feasible point on rates, terms and conditions that are just reasonable and nondiscriminatory; 4) the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers, and the duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on resale; 5) the duty to provide notice of changes in any information necessary for the transmission and routing of services using the incumbent LEC’s facilities; and 6) the duty to provide, on rates, terms and conditions that are just, reasonable and nondiscriminatory, physical collocation of equipment necessary for interconnection or access to unbundled network elements, except that virtual collocation may be offered where physical collocation is not practical for technical reasons or due to space limitations.

Tennessee Telephone may claim. Rather, Hyperion is merely requesting that its existing Certificate of Public Convenience and Necessity be extended to allow Hyperion to compete in the service area of Tennessee Telephone, in accordance with the current state of the law. To the extent that the rural LEC exemption is applicable (which Hyperion does not concede), only Tennessee Telephone's obligations to provide certain services or facilities under § 251(c) would be implicated, but in no way would there be any impact on the TRA's obligation to allow Hyperion to provide service. Obviously, both Hyperion and Tennessee Telephone will be required to comply with the obligations set forth in Sections 251(a) and 251(b) (which apply to all local exchange carriers).

At this time, however, Hyperion is not requesting that Tennessee Telephone be required to comply with the obligations of incumbent local exchange carriers set forth in Section 251(c). More specifically, Hyperion is not requesting that Tennessee Telephone provide Hyperion with the heightened interconnection requirements of Section 251(c)(2), or that Tennessee Telephone make available to Hyperion unbundled access to Tennessee Telephone's network elements, as described in Section 251(c)(3). Furthermore, Hyperion is not requesting that the TRA require Tennessee Telephone, under Section 251(c)(4), to offer for resale at wholesale rates Tennessee Telephone's retail services, or that Hyperion be allowed to collocate facilities on Tennessee Telephone's premises, as discussed in Section 251(c)(6). As stated previously, Hyperion is merely requesting that it be authorized to provide service in Tennessee Telephone's service area, and that both parties be bound by the obligations of Section 251(a) and 251(b).

IV. Standard For Federal Preemption of State Law

The Supremacy Clause of Article VI of the Constitution of the United States provides

Congress with the power to preempt state law.⁸ Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is an actual or outright conflict between federal and state law, where compliance with federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively (thus occupying an entire field of regulation and leaving no room for the States to supplement federal law), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.⁹ It is well established that preemption may result not only from action taken by Congress itself, but also from a federal agency acting within the scope of its congressionally delegated authority.¹⁰

Congress specifically provided for FCC preemption of state law in Section 253 of the 1996 Act, which states:

(a) IN GENERAL.---No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY.---Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(d) PREEMPTION.---If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal

⁸ Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 368 (1986) ("Louisiana v. FCC").

⁹ Id. at 368-69.

¹⁰ Id. at 369

requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.¹¹

In assessing whether to preempt a statute or regulation, the FCC must first determine whether such statute or regulation is proscribed by the terms of § 253(a) of the 1996 Act.¹² If the FCC determines that a statute or regulation is proscribed by § 253(a), the FCC must then determine whether the legal requirement falls within the exception to § 253(a)'s proscription set forth in § 253(b).¹³ If the statute or regulation is "impermissible under § 253(a), and do[es] not satisfy the requirements of section 253(b), [the FCC] must preempt the enforcement of those legal requirements in accordance with section 253(d)."¹⁴

The FCC has consistently recognized that "section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality."¹⁵ As explained in the FCC's *Interconnection Order*, under the 1996 Act, the opening of the local exchange and exchange access markets to competition "is intended to pave the way for enhanced competition in all telecommunications markets, by

¹¹ 47 U.S.C. § 253.

¹² *In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, FCC 97-336, CCB Pol 97-1, ¶ 37 (Sep. 24, 1996) ("*Silver Star*").

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *In the Matter of Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, Memorandum Opinion and Order, CCBPol 96-10, FCC 96-397 at ¶ 25 (rel. Oct 1, 1996) ("*Classic Telephone*") (holding that Kansas municipalities' grant of exclusive franchise to a single telecommunications provider violates Section 253(a)).

allowing all providers to enter all markets.¹⁶ Congress primarily intended for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers, and by providing for preemption under section 253(a) sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals.¹⁷ In specifically addressing the impact of section 253 on rural carriers, former FCC Commissioner Chong asserted that while rural carriers face some unique circumstances that warrant some special regulatory treatment, rural carriers should not carry this argument too far.¹⁸ Commissioner Chong stated that if rural carriers “try to translate ‘exceptions’ for rural carriers into outright insulation against all competition, [rural carrier] arguments will fall on deaf ears...there is no question that Congress clearly envisioned that the benefits of competition should be spread across this great country. It did not want rural America left out of the Information revolution.”¹⁹

V. The FCC Has Preempted Incumbent LEC Protection Provisions That are Virtually Identical § 65-4-201(d)

The FCC has twice considered statutory provisions that are virtually identical to § 65-4-201(d), and has preempted both statutes as violative of § 253(a) of the 1996 Act.

¹⁶ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Red 15499 (1996) at ¶ 4 (“*Interconnection Order*”), Order on Reconsideration, CC Docket No. 96-98, 11 FCC Red 13042 (1996), *reversed in part, sub nom.* Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1996) (“*Eighth Circuit Order*”).

¹⁷ Classic Telephone at ¶ 25.

¹⁸ Commissioner Rachelle Chong, Address at the Western Rural Telephone Association’s Fall Convention in Bloomington, Minnesota (Sep. 30, 1997).

¹⁹ Id.

A. The Silver Star Decision. Silver Star is an incumbent LEC certificated to provide local exchange service in western Wyoming, and applied to the Wyoming PSC to become certificated to provide local exchange service in nearby Afton, Wyoming. The incumbent LEC serving Afton opposed Silver Star's application. The Wyoming PSC denied Silver Star's application, relying exclusively on a provision in the Wyoming Act which provides that

Prior to January 1, 2005, in the service territory of a local exchange telecommunications company with thirty thousand (30,000) or fewer access lines in the state, the commission shall, after notice and opportunity for hearing, issue a concurrent certificate or certificates of public convenience and necessity to provide local exchange service, only if, the application clearly shows the applicant is willing and able to provide safe, adequate and reliable local exchange service to all persons within the entire existing local exchange area for which certification is sought and the incumbent local exchange service provider: (i) Consents to a concurrent certificate; or (ii) Is unable or unwilling to provide the local exchange service for which the concurrent certificate is sought; or (iii) Fails to protest the application for the certificate after notice and opportunity for hearing; or (iv) Has applied for and received a concurrent certificate to provide competitive local exchange telecommunications services in any area of this state.²⁰

Silver Star petitioned the FCC to preempt this provision of the Wyoming Act, and the Wyoming PSC's order denying its certification application (the "*Denial Order*"). Pursuant to its statutory authority under Section 253(d) of the 1996 Act, the FCC preempted both. In holding that the incumbent protection provision of the Wyoming Act violates Section 253(a), the FCC noted that "section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality."²¹ An absolute prohibition on competitive entry "is precisely the type of action Congress intended to

²⁰ WYO. STAT. ANN. § 37-15-201(c) (1995) (emphasis added).

²¹ *Silver Star* at ¶ 38.

proscribe under Section 253(a).”²² In keeping with the direction of Section 253(d) to preempt only “to the extent necessary,” the FCC did not order the Wyoming PSC to grant Silver Star’s certification application. However, the FCC stated that it “expect[s] that the Wyoming Commission will promptly respond to any request by Silver Star to reconsider Silver Star’s application for a concurrent CPCN to serve the Afton exchange consistent with the Communications Act and our decision to preempt the enforcement of the *Denial Order* and the Wyoming Act’s rural incumbent protection provision.”²³

Having determined that the incumbent protection provision of the Wyoming Act violates Section 253(a), the FCC next examined whether the provision falls within Section 253(b)’s exception to Section 253(a)’s proscriptions. The FCC noted that “Section 253(b) preserves a State’s authority to impose a legal requirement affecting the provision of telecommunications services, but only if the legal requirement is: (i) ‘competitively neutral’; (ii) consistent with the Act’s universal service provisions; and (iii) ‘necessary’ to accomplish certain enumerated public interest goals.”²⁴ The FCC found “that the rural incumbent protection provision is not competitively neutral...the rural incumbent protection provision awards those incumbent LECs the ultimate competitive advantage -- preservation of monopoly status -- and saddles potential new entrants with the ultimate competitive disadvantage -- an insurmountable barrier to entry.”²⁵

²² *Silver Star* at ¶ 39.

²³ *Silver Star* at ¶ 47.

²⁴ *Silver Star* at ¶ 40.

²⁵ *Silver Star* at ¶ 42.

B. The Texas Preemption Decision.

On May 10, 1996, the Texas Public Utility Commission ("Texas PUC") filed a petition requesting that the FCC determine whether certain provisions of the Texas Public Utility Act of 1995 ("PURA95")²⁶ violate § 253 of the 1996 Act and must be preempted ("Texas Preemption Decision").²⁷ Among the numerous issues considered by the FCC in the Texas Preemption Decision was whether PURA95 § 3.2531(h), an incumbent LEC protection provision, violated § 253(a) of the 1996 Act.

PURA95 § 3.2531(h) is a statutory provision prohibiting the Texas Commission from granting Certificates of Operating Authority ("COAs"),²⁸ before September 1, 1998, in an exchange of an incumbent LEC serving fewer than 31,000 access lines in Texas. After noting that "section 253 expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandate that 'prohibit[s] or has the effect of prohibiting' a firm from providing any interstate or intrastate telecommunications service, the FCC stated:

that the moratorium on the grant of COAs in exchanges of incumbent LECs serving fewer than 31,000 access lines, set forth in PURA95 section 3.2531(h), violates the terms of section 253(a) of the Act standing alone. [The FCC] also find[s] that this PURA95 provision does not fall within the protected class of state regulation described in section 253(b) of the Act, and [the FCC] therefore preempt[s] the enforcement of this provision pursuant to section 253(d). PURA95 section

²⁶ TEX. REV. CIV. STAT. ANN. art. 1446c-o (West Supp. 1996).

²⁷ *In the Matter of the Public Utility Commission of Texas*, CCBPol 96-13, *The Competition Policy Institute, IntelCom Group (USA), Inc., and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Company, Inc.*, CCBPol 96-14, *Teleport Communications Group, Inc.*, CCBPol 96-16, *City of Abilene, Texas*, CCBPol 96-19, *Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order (rel. Oct. 1, 1997).

²⁸ A COA in Texas is the equivalent of a Certificate of Public Convenience and Necessity in Tennessee.

3.2531(h) flatly prohibits the Texas Commission from granting a COA in the specified territories, thus precluding an entity holding a COA from providing *any* service in such markets.²⁹

In holding that PURA95 section 3.2531(h) is not permissible under section 253(b), the FCC characterized such a blanket prohibition of competition as neither competitively neutral nor necessary to achieve any of the policy goals articulated in section 253(b). Thus, the FCC concluded that section 3.2531(h) was in direct conflict with section 253(a), which is designed to prevent such restrictions on entry. Moreover, the FCC concluded that PURA95 section 3.2531(h) is not otherwise permissible under section 253(b).

VI. Section 65-4-201(d) is Preempted By Federal Law

Silver Star and the *Texas Preemption Decision* make it clear that statutory provisions such as § 65-4-201(d) of the Tennessee Code cannot stand in view of section 253(a) of the 1996 Act. Section 65-4-201(d) is an absolute prohibition against competition in areas of Tennessee served by incumbent LECs having fewer than 100,000 access lines.³⁰ The FCC has consistently recognized that section 253(a) of the 1996 Act, *at the very least*, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality.³¹ Notably, the statutes at issue in *Silver Star* and the *Texas Preemption Decision* were substantially less onerous than § 65-4-201(d). At issue in *Silver Star* was a Wyoming statute that prohibited competition in areas served by an incumbent LEC with 30,000 or fewer access lines,

²⁹ Id. at ¶ 106-07 (emphasis supplied).

³⁰ Unless, of course, the incumbent LEC voluntarily elects to allow competitors into its service areas.

³¹ See *Classic Telephone* at ¶ 25; *Silver Star* at ¶ 38; *Texas Preemption Decision* at ¶ 106-07.

and the statute that ultimately was preempted by the *Texas Preemption Decision* prohibited competition in areas served by an incumbent LEC with fewer than 31,000 access lines. Section 65-4-201(d) prohibits competition in areas served by an incumbent LEC with fewer than 100,000 access lines, thus providing enormous entities such as Tennessee Telephone (who has nearly 100 times more access lines in Tennessee than Hyperion), blanket protection against competition.

In applying relevant preemption precedent, it becomes clear that section 65-4-201(d) is impermissible on several grounds. As discussed previously, preemption occurs when Congress, in enacting a federal statute 1) expresses a clear intent to preempt state law; 2) when there is an actual or outright conflict between federal and state law; 3) where compliance with federal and state law is in effect physically impossible; 4) where there is implicit in federal law a barrier to state regulation; 5) where Congress has legislated comprehensively (thus occupying an entire field of regulation and leaving no room for the States to supplement federal law); or 6) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.³²

In enacting section 253(a), Congress expressed its clear intent to preempt State or local laws that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Moreover, in section 253(d), Congress specifically provided for FCC preemption of any State or local law that violates section 253(a). There is a direct conflict between section 65-4-201(d) of the Tennessee Code, which prohibits competition in areas served by incumbent LECs with fewer than 100,000 access lines, and section 253(a) of the 1996 Act, which prohibits State or local governments from enacting laws prohibiting the ability of *any* entity to provide *any* interstate or intrastate telecommunications service.”

³² Louisiana v. FCC at 368-69.

Congress' intention to preempt statutes such as section 65-4-201(d) is clear and unambiguous, and Congress notably referenced both interstate *and* intrastate telecommunications services in section 253(a).

The 1996 Act is a comprehensive regulation that sought to establish "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans *by opening all markets to competition.*"³³ Therefore, Congress

rejected the historic paradigm of telecommunications services provided by government-sanctioned monopolies in favor of a new paradigm that encourages the entry of efficient competing service providers into all telecommunications markets. Congress envisioned the emergence of robust competition among multiple service providers in all industry segments, with marketplace forces supplanting regulation as markets become more fully competitive.³⁴

Any blanket prohibition against competition such as that contained in Section 65-4-201(d) stands as a direct obstacle to the accomplishment and execution of the full objectives of Congress in enacting the 1996 Act. More specifically, section 65-4-201(d) deprives Tennessee consumers from obtaining the benefits of competition, which includes lower prices, better quality services, and increased choice of innovative, diversified, and reliable service offerings.

³³ S. CONF. REP. NO. 104-230, 104th Cong., 2d Sess. 1 (1996) (Conference Report) (emphasis added).

³⁴ *Texas Preemption Decision* at ¶ 1; see also *FCC Interconnection Order* at ¶ 1-5.

CONCLUSION

For the foregoing reasons, AVR, L.P., d/b/a Hyperion of Tennessee, L.P., respectfully requests that the TRA grant Hyperion's application for a Certificate of Public Convenience and Necessity to extend its service territory to include areas currently served by Tennessee Telephone Company.

Respectfully submitted,

Kemal M. Hawa (by Val)
Dana Frix (by Val Sanford w/permission)
Kemal M. Hawa
SWIDLER & BERLIN, CHTD.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
(202) 424-7500 (Phone)
(202) 424-7645 (Fax)

Counsel for
AVR, L.P. d/b/a Hyperion of Tennessee, L.P.

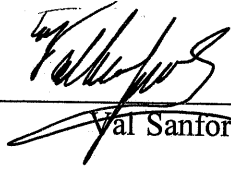
OF COUNSEL:

Val Sanford #3316
GULLETT, SANFORD, ROBINSON & MARTIN, PLLC
230 Fourth Avenue, North
P.O.Box 19888
Nashville, TN 37219-8888
(615) 244-4994

Christopher J. Rozycki
Director, Regulatory Affairs
Hyperion Telecommunications, Inc.
DDI Plaza Two
500 Thomas Street, Suite 400
Bridgeville, PA 15017-2838
(412) 220-5079

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief of AVR of Tennessee, L.P. d/b/a Hyperion has been served via Hand-delivery or First Class Mail, postage prepaid, this 17th day of February, 1998 as follows.



Val Sanford

Bruce Mottern
Director of Regulatory Affairs
TDS-Telcom Southeast Region
P. O. Box 22995
Knoxville, TN 37993-0995

T. G. Pappas, Esq.
Joseph F. Welborn, Esq.
Bass, Berry & Sims
2700 First American Center
313 Deaderick Street
Nashville, TN 37238

L. Vincent Williams, Esq.
Consumer Advocate Division
425 5th Avenue, North
Nashville, TN 37243